SOUTH AFRICAN CHURCH QUESTION.

GRAHAM'S TOWN JUDGMENT.

C. J. COOPER.

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THE GRAHAMSTOWN JUDGMENT.

DECISION OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

IN THE APPEAL OF

"MERRIMAN *v.* WILLIAMS."

EDITED, WITH AN INTRODUCTION,

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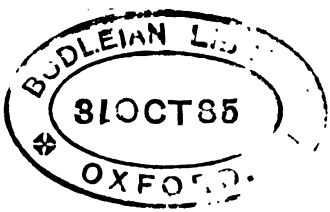
"ROGATE QUÆ AD PACEM SUNT JERUSALEM."—
Liber Psalmorum, Vulg. Edit. CXXI., v. 6.



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ERRATUM.

N.B.— Page 46, line 12, read "Crown," instead of "Church."

"ROGATE QUÆ AD PACEM SUNT JERUSALEM."—
Liber Psalmorum, Vulg. Edit. CXXI., v. 6.

INTRODUCTION.

THE Statute Book of the Colony of the Cape of Good Hope bears witness to the fact that in the second quarter of the present century the English Church was striking root in South African soil. An Ordinance bearing date the 1st September, 1829, after reciting *(inter alia)* that several persons had "subscribed certain sums of money for the purpose of erecting a Church at Cape Town for the celebration of Divine Service according to the rites of the United Church of England and Ireland as by law established," goes on to authorise the raising of money on loan by shares, and to make regulations for the administration of trusts and for the election of a Vestry "by and out of the resident inhabitants of Cape Town, being members of and holding communion with the United Church of England and Ireland as by law established." This important Ordinance is the precursor of others, most of them similar in expression, providing for the building and government of churches at Bathurst (1832), Wynberg (1833), Graham's Town (1839), Port Elizabeth (1842), Sidbury (1842), Fort Beaufort (1845), and Graaff-Reinet (1846), and the origin of all of them is to be ascribed rather to the expansion of the British Empire then steadily proceeding, than to the new birth of energy, which amid much surging of thought upon matters social and political as well as religious, was just at that time manifesting itself in the Anglican Communion at home.

It is important to observe that the circumstances of the British Colonies in South Africa were, as indeed they are still, widely different from those of almost every other. The Cape had long been a Dutch possession, and such of its inhabitants as were of European extraction (these being a comparatively small minority of the whole population) were of Dutch descent. The pastoral care of them had been for many generations, as to a very large extent it remains, in the hands of the ministers of the Dutch Reformed Church; whilst Christianity itself had made but slight progress among the coloured people. When the English Churches above mentioned were erected, their relation to the general ecclesiastical system of the Colony was a similar one to that existing at the present moment upon the European Continent between the isolated buildings there maintained for the benefit of a few English residents and those of the various national systems. As years went on and the British element gained in numerical strength, this aspect of things became very considerably modified, but over a wide area it is the aspect still actually presented. In a very limited number of places the Anglican Church is a factor of pre-eminent influence in the community; but for the most part its congregations are those of missionary stations pure and simple, or of small and struggling outposts.

In 1853 a metropolitical throne was, by virtue of Royal Letters Patent, set up in South Africa, and Dr. Robert Gray, who for some six years had been Bishop of Cape Town, became first Metropolitan. The interests of the Colonial Church were at about that period exciting considerable attention, and causing much anxiety in England. Efforts had recently been made to bring Imperial legislation to bear upon them, but the objection had been raised that such legislation would be an interference with Colonial liberties. "It would infringe" wrote Sir James Stephen, giving expression to the opinion of many thoughtful people,

"the sacred colonial franchise of self-government." And so the doctrine gradually emerged that where there had not already been any enactment, either of the Imperial Parliament or of a Colonial Government or legislature, the Anglican Body was in no other position than that of a "voluntary association." "We are not" said Bishop Gray, in delivering his charge at his first Diocesan Synod (1857), "established in any sense, as the Church is in England. Neither the Holy Scriptures—nor the Book of Common Prayer—nor the Articles—nor the Canons—nor the Book of Homilies—are in any legal sense, that is, by the civil law of this country, our standard of faith, of worship, and of discipline. . . . We are, in the eye of the law, a mere voluntary association, bound together by our own internal rules and regulations, but having no more claims for countenance and support, on the part of the civil law, than the most ordinary association for worldly purposes—an insurance society, or, as it has been said by a high authority, a convivial club."

It is too late now to lament over the course of events which made this doctrine true. The correctness of Dr. Gray's statement of the legal situation is unquestionable, and was a few years later brought into relief by the language of the highest court of civil appeal which the Constitution of the Empire recognises. Modern jurisprudence, where unaffected by the special historic position of an Established Church has in a remarkable manner maximised the autonomy of ecclesiastical bodies,* and the State tacitly consents to such a limitation of its own authority as is involved in allowing its courts to give effect to the decisions of tribunals which have their law made for them without the intervention of the supreme legislature. But it ought never to be overlooked that the autonomy of a body corporate does

* See the language of Lord Cranworth in *Forbes* v. *Eden*, L. R., 1 Sc. and Div. 582, "I feel it impossible to say that any Canons which they [Synods] establish can be treated as being *ultra vires*. The authority of the Synod is supreme."

not necessarily mean the liberty of its members. On the contrary, they must the more jealously guard their liberty. The word "Voluntary" must not be taken from the law-courts, and applied in a sense, at which all true Churchmen may well shudder, remembering, as they ought to remember, the fundamental truth that the Church of God can never be "voluntary," since she was neither made nor can be unmade by man. How extreme was Bishop Gray's bewilderment is amply illustrated by a quotation from one of his letters, which has recently been brought to public notice by the author of an able pamphlet.* "Writing on May 9th, 1865, to the Rev. C. N. Gray," says the author of the pamphlet, "the Bishop, relating a conversation which he had recently had with the then Governor, uses these words, 'Oh, no! said I, we *are* a voluntary religious association; we have been ever since I came here, and those have joined it who liked, and we have been a visible association ever since I held my first Synod. *It is for me to say whether I will take you into my association and on what terms.* This was rather a new idea to him, and I think it will be to many others when they find it out.'"

No wonder that a prelate who could write in this way should be found assaulting the rights of members of the Church. To dwell at greater length, however, than is necessary for explaining present troubles in South Africa, upon the mistakes of a devoted and noble-minded servant of God, now departed to his rest, would be graceless and ungenerous. The living should carefully beware of condoning the mistakes committed, and of perpetuating the spirit which led to them.

Bishop Gray's differences with the Revd. William Long arose out of his attempt to *enforce* the recogni-

* "*Unity or Uniformity:*" A letter to the Metropolitan and Bishops of the Church of England in South Africa. By an English Clergyman. Cape Town: Darter Brothers and Walton. Page 12.

tion of his Synods upon all his clergy ; at a time, moreover, when very grave doubts existed as to the legality of Synodical action. Without express licence from the Crown, it had admittedly been rendered illegal in England by Stat. 25 Hen. VIII., c. 19, on the part of the two great assemblies which have been usually deemed to be the Provincial Synods of the Church of England—viz., the Convocations of Canterbury and York. The 12th Canon, moreover, of the year 1603, presumed by not a few to be as binding upon Colonial Churchmen as upon those at home, had declared that "whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders or constitutions in causes ecclesiastical, without the King's authority, and shall submit themselves to be ruled and governed by them; let them be excommunicated *ipso facto*, and not be restored until they repent, and publicly revoke those their wicked and Anabaptistical errors."

In the absence of permissive statute (which in Canada and in Victoria was supplied by the Colonial Legislatures) Dr. Gray, backed by the sympathy and similar conduct of certain other Colonial Bishops, resolved to proceed without it. The first Diocesan Synod of the "Church of the Diocese of Cape Town" (such to the scandal of some good men was the official title adopted) met amid the emphatic protests of several prominent persons, and upon Mr. Long's refusal to take any steps to procure the election of a delegate for his parish to a subsequent Synod (convened for January 11th, 1861), the Bishop thought fit to go the length of holding a court, and to pronounce a sentence of suspension. As Mr. Long treated the sentence with entire contempt, a further court was held, and a sentence of deprivation passed.

Nothing was left for Mr. Long but to appeal for protection to the civil power. And from an adverse decision of the Supreme Court of the Colony he

finally carried his case to the Judicial Committee of the Privy Council, where the decision just mentioned was reversed with costs. His acts, said the Committee, had to be construed with reference to the position in which he stood as a clergyman of the Church of England towards a lawfully appointed Bishop of that Church, and to the authority known to belong to the episcopal office in England. Now he had not, they continued, in recognizing the Bishop's authority, acknowledged a right on his Lordship's part to convene a Synod and to require his clergy to attend it. And it was a mistake to treat the particular assembly convened by the Bishop as a Synod at all. It was simply a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing in fact certain laws, by which all members of the Church of England in the Colony, whether they assented to them or not, should be bound. "Accordingly," proceeded their judgment, "the Synod which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislature, to bind persons not in any manner subject to its control."

The Long case illustrated the manner in which, notwithstanding the extension given by the policy of the Law in our age to the principle of the self-government of religious societies, secular authority must unavoidably intervene to prevent abuses of individual freedom. Although from the most solemn point of view the only supreme Power in the Church is that of her Living but Invisible Head, speaking through Holy Scripture, through the experience of passing centuries, through the corporate Reason and Conscience, through what Cardinal Newman has well called the *Schola Theologorum*, and through the lives of Saints; and although it is wicked on the part of Christians to invoke the aid of Civil Courts whenever such a course

is avoidable, there must needs be many occasions when this is quite unavoidable. It is an accepted principle that in general the Civil Law will not interpose except where some property right is affected, but practically almost every matter disputed raises some question of property, and wherever this kind of question can be brought in, either directly or indirectly, the secular judges, if appealed to, insist on considering it. Thus, in the famous case of *Murray v. Burgers** the Supreme Court of the Colony of the Cape of Good Hope overruled an objection which was raised on behalf of the governing body of the Dutch Reformed Church to the intervention of the Court on the grounds of inherent spiritual authority residing in that body; and this, even in spite of the existence of an Ordinance of the Governor and Legislative Council of the Colony,† which had purported to exempt censures pronounced by the Church judicatures for scandals and offences from the cognizance of the civil tribunals.‡

Sometimes, as in the great English case of *Shore v. Attorney-General*§ (Lady Hewley's Charity), the intervention of the Law Courts involves a lengthy examination into and an interpretation of doctrinal formularies.

But now, in the eventful year of the last stage of the dispute with Mr. Long, the eyes of Christendom were being drawn upon Bishop Gray's doings by a matter altogether more portentous. "I will wield spiritual weapons only," wrote the Bishop on June 14th, 1863, meaning unfortunately, not the potent weapons of Prayer, Forbearance, and Patience. That there was canonical precedent for the proceedings of a Metropolitan against a Suffragan deemed to have fallen into heresy must be

* The case on appeal to the Privy Council is reported in L. R. 1 P.C. 362, and also in 4 Moore's P.C.C., N.S., 250.

† See Ordinance No. 7, 1843.

‡ See also the following leading cases:—*Warren's Case*, reported in Grindwood's Compendium; *McMillan v. The General Assembly of the Free Church of Scotland* (Cardross Case), 23, Dunlop, 1314.

§ 9 Cl. & F. 355.

admitted, and it would appear that similar proceedings if taken by one of the Metropolitans in the Established Church at home are not disallowed by the Law of the Church and Realm. But the Court held in the Cathedral Church of Cape Town was certainly one in which, as Dr. Colenso pointed out in a letter addressed to the laity of his diocese, the prosecutors were the judges, and in which the whole character of the procedure was inconsistent with an English sense of justice. That so many good people have refused, or failed to see this, is a lamentable instance of the distortion of the will and of the intellect which may be begotten even of a righteous zeal. It is far too often overlooked, and that, in spite of all the bitter lessons of history, that precedents of injustice are arms which may be used with deadly effect in bad as well as in good causes.

Posterity will assuredly read with emotion the record of the manful opposition to wrong made in England by the late illustrious Archbishop of Canterbury (then Bishop of London)* and the burning words of Dean Stanley. The latter thus characterised† the Synod by whose authority Bishop Colenso was condemned. "There were in it [besides, of course, the Bishop of Cape Town,] two bishops, the Bishop of Grahamstown and the Bishop of Orange River, which latter was not, properly speaking, a bishop of the Colony at all, but a bishop brought from over the border. . . . Here is one bishop to be tried before three others. Can anything be more likely than that, if there was a quarrel at all, the three should take part against the one? But, if they did, the three would have the power of deposing him, and he would not possess the smallest means of redress." "I must say," continued the Dean, "that if this principle is affirmed, the whole foundation of

* Also by the Archbishop of York.

† Essays chiefly on questions of Church and State:—Essay VIII. The South African Controversy.

the Colonial Church will be cut away. Can we imagine that any man of high character would consent to go out and take an important post in the Colonial Church, if he was liable for any reason whatever, to be deprived by his Metropolitan, either in virtue of his own sole authority, or with the aid of two or three other bishops who happened to take the Metropolitan's side?" And then in pointing out the imminent peril involved in a condonation of Bishop Gray's proceedings on the part of Convocation, he exclaimed:—"I must say, if that is the course which the House should choose to adopt, woe to the Colonial Church! Woe to its independence! Woe to its freedom! Woe to its chance of exercising that influence over those great branches of the Empire, which we might once have hoped to see it exert! I, for one, will never consent to put my hand to such an utter degradation of my fellow-countrymen and of my fellow clergymen! Talk of 'a free Colonial Church!' Free Colonial Church, indeed, when it is to be deprived of every privilege that makes the freedom of the English Clergyman and the English Citizen dear to us!"

Pronounced excommunicate, and deprived of his see, after what was looked upon not by himself alone as a mock-trial, what course remained open to Dr Colenso? Surely there might seem, if Bishop Gray claimed the office of Metropolitan by virtue of Letters Patent, to be a special propriety in taking advantage of a doubt yet remaining as to the appellate jurisdiction of the august Source of Letters Patent in questions between persons to whom such letters had been given. If, on the other hand, Letters Patent were an absolute nullity, and the Royal Supremacy completely nothing in respect of the Church in Colonies possessing an independent Legislature, whence could Bishop Gray derive his claim to concern himself with a prelate reigning in a separate political community? Were it contended that such a claim was justified by the recognition throughout South Africa of a certain

canonical jurisprudence, which is the indefeasible heritage of the Catholic Church, the justification was disputed, and the canonical jurisprudence rightly or wrongly believed by those, upon whom an endeavour was made to turn it into an engine of attack, to have been discarded by the Anglican portion of the Catholic Church at the Reformation settlement.

In the light of all the results of Bishop Gray's precipitate action, it can hardly be presumptuous to remark that his Lordship, in view of the extreme perplexity of the whole position at the outset, ought not to have attempted to put in force any jurisdiction he might have thought himself to have. In other words he should have let Dr. Colenso alone, and should have devoted his energies to getting his prerogatives better defined, so that perchance they might be available in future for saving the Church from scandals.

So far, however, was he from observing this, that actually when the Crown had spoken and denied the *de facto* legitimacy of all his claims, he hurried on to produce a scandal greater than that which he had hoped to remedy, and which, instead of being merely temporary in its nature, has already proved to be long-abiding, and threatens to leave permanent effects. Since the corrupt age, which by a singular infatuation Dr. Gray actually thought worthy of being taken for a model, few more grievous errors have been committed than the creation of a rival Bishop within the diocese of one deemed by very many of his people to be the only true Bishop. To these it might well appear that Dr. Colenso, even if heretical, had not lawfully been deposed, and upon no received principle could it be maintained that heresy *ipso facto* worked excommunication and deposition. Moreover, upon the very view so strongly relied upon by the other party of Colonial rights, Bishop Gray seemed to have no *locus standi* for concerning himself with the internal affairs of the Church of Natal. What better pretence could his Church

have for interference than the Church of the Mother Country herself? And as for the support given him by Convocation, had the law of England for 300 years ever regarded its voice, however venerable its utterances might be in the ears of all true Churchmen, as *the* voice of the English Church?

In the dark period of anguish and schism which immediately followed upon the Natal troubles, the present Constitution of the "Church of the Province of South Africa" had its birth. That it was in many respects admirably drafted, probably no candid critic will deny. It was the work of men of marked erudition, of organizing skill, of devout purpose, and of sincere regard for the Catholic and Apostolical principles of the Anglican Communion. But it had the conspicuous fault of coming into being prematurely, and was tainted *ab initio* by reason of its origination with only a portion of the Church, and of its affecting to bind persons who could not conscientiously admit its authority. Thus the wisdom of a dictum of Hooker was entirely forgotten, that "when all which the wisdom of all sorts can do is done for the devising of laws in the Church, it is the general consent of all that giveth them the form and vigour of laws . . . . laws could they never be without consent of the whole Church." *

The Judgment in Merriman *v.* Williams has now established what common sense might have indicated, that the "Constitution" effected a severance between the Church of the Province of South Africa and the Church of England in South Africa. And it further decided the point that there is a sense in which the Church of England can exist in South Africa, and as such be entitled to property settled to uses in favour of the Church of England,† and be free from the control of the Bishops and Synods of the Church of the

* *Ecclesiastical Polity*, Book viii., ch. vi. sec. ii.

† Apparently the presence or absence of the words "as by law established," would make no difference to the legal effect of instruments of title bearing date before 1870.

Province of South Africa. The sense in which the Church of England can exist is of course this, that there may be an organization in South Africa which professedly adopts the whole of the Faith and Order and Discipline of the Church of England in so far as Colonial circumstances admit. The "Church of the Province of South Africa" does not adopt the *whole* but formally excludes a part of this Faith, Order and Discipline. A large number of persons who had up to the date of the Grahamstown Judgment been under the impression that the "Church of the Province of South Africa" represented the Church of England in South Africa, were disabused of that impression by the Judgment, and now share with those who at first resisted the imposition of the Constitution the wish to see that Constitution reformed or altogether remodelled. Not all of them perceive clearly yet the constitution's original unfairness, but all perceive the breach it makes with our English church traditions, if not also its incompatibility with that freedom which by the efforts of our forefathers was secured as the birthright of the members of the Anglican Communion in its extension throughout the world, since it places the Church under the heel of a Provincial Synod, assuming a jurisdiction little less anomalous in kind than that pretended to in the Middle Ages over England by the Roman Pontiffs. The "Province of South Africa" takes in not only several of the Queen's Colonies, but certain Foreign countries, *e.g.*, The South African Republic, and the Orange Free State; in respect of all which the Bishop of Cape Town should have nothing more at most than a Primacy. His Lordship might from time to time hold a Pan-South-African Council, which should advise and not govern; but a Provincial Synod, with coercive power extending into Foreign communities, is a standing menace to the health if not to the very life of the Church.

It cannot be worth any one's while at this late

date to oppose Provincial action altogether. It has become by this time a feature, perhaps, of every unestablished Church of the Anglican type, and is to be defended, notwithstanding the way in which Provinces sometimes interfere with creeds, and play the Philistine with public worship. The Provincial Synod of the "Church of the Province of South Africa" has not yet done anything of this sort, and has not therefore been so unlucky as to be gibbeted in any letter to *The Guardian* by a High-church Canon, with its name in inverted commas.*

As it happens, indeed, the Church of the Province of South Africa has erred, if it has erred, in a direction opposite to that of the Irish Church, and has given rise to fears that in its zeal for an exclusively High-church interpretation of Anglican standards of doctrine and discipline, it is likely to crush out of toleration within it those elements known respectively as "Broad" and "Evangelical," which are thought to have so long given the Church at home very much of her effective strength; and that it will the more easily do this by reason of the part taken in its government by the foreign Bishops.

The Third Proviso in the Articles of the Constitution of the Church of the Province of South Africa runs as follows:—

Provided also that in the interpretation of the aforesaid standards and formularies the Church of this Province be not held to be bound by decisions in questions of faith and doctrine or in questions of discipline relating to faith and doctrine other than those of its own ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal.

This is the Proviso which the upholders of the Constitution in its integrity have conceived the idea that it would be a moral offence to surrender. They think that to give it up would be to formally recognize what they regard as the iniquitous usurpation over the

* See Canon Liddon's letter to "The Guardian," Aug. 5th, 1885.

spiritual matters of the Church of England of the Judicial Committee of the Privy Council. Now the chief reason why that Proviso should be abandoned is because it came into being in a morally evil way. And perhaps, after all, it is not the real protection which its framers imagined. This has been observed by his Grace the Archbishop of Canterbury in a courteous reply to certain influential churchmen who recently appealed to his fatherly sympathy. The Judicial Committee of the Privy Council has an ecclesiastical jurisdiction in England by virtue of legislation, which it may be in the most eminent degree desirable to see repealed and replaced by such as shall give authority to a tribunal more acceptable to the whole Church. This jurisdiction is something entirely distinct from that with which the Committee was invested by Stat. 3 and 4 Will. IV., c. 41, as Civil Court of Appeal from all Colonial Courts. Now, in the exercise of this latter jurisdiction, in an appeal case involving the interpretation of the Standards and Formularies of the English Church even if accepted with the reservation made by the Third Proviso, the Committee would be obliged practically to take the decisions of the Lords of the Council sitting in their ecclesiastical capacity, as a *guide*, if not as binding upon them. With great submission the present writer would venture to remark that it does not appear to be quite correct to hold that the existence of the Proviso would make no difference to the ratio decidendi in the cases of appeal from the Colonies. There would be, he believes, the difference which sometimes, though rarely, becomes material between the following of illustrative and of absolutely binding precedent.

If the Proviso should be proved not to have the practical effect which is by its upholders supposed, it might be thought that its removal ought to be regarded by their opponents as of no importance. And although this cannot be so, seeing the stress laid upon it by the Judicial Committee as indicating the intentions of the

framers of the Constitution of 1870, the true course for those who are fighting for the recovery of the full Order of the Church of England would seem to be not to endeavour to override the conscientious scruples of others, (scruples for which charity demands all due respect,) but to try to get all Churchmen to concur in replacing the present Constitution by one altogether more Catholic in its origin and character. And at a juncture exceedingly serious in its possible bearings upon the future of the Anglican Communion throughout the world, surely the English Bishops may be looked to with confidence for a paternal interposition of their good offices in the interests of peace. If all parties should agree to a restoration of the entire Order of the English Church so far as the political circumstances of South Africa allow, this would not (surely it is hardly necessary to say) imply the admission of a doctrine that the Order of the English Church is either perfect or likely to be final. The lessons of History no doubt warn us against any such narrow notion, and point towards the possible advent of a day (may it be far distant!) when the very word "English" shall no longer apply to anything, whether political, or ecclesiastical in a living world.

A problem of very solemn moment will soon be pressing itself upon the attention of Anglican Christendom. As the doctrine of the Royal Supremacy becomes year by year less practically significant in respect of the life of the Church at large, the need becomes more and more apparent of something that shall fulfil the function which in the past has been fulfilled by the Crown. What in the time to come shall be (humanly speaking) the central stronghold of Anglican Unity, and what the bulwarks of Catholic Faith and Discipline? Will the Church, it may be asked, have recourse again to systems of control and of appeal which were relied upon in former ages, Patriarchates, Councils? No one can venture to predict; but it is only right to study the question in the light thrown on it by history, and

by the experience of our own and recent generations. It may be that events in South Africa during the past thirty years can instruct and warn.

There appears to be some amount of prejudice among Churchmen in England against those who in South Africa have been fighting long, and in spite of great odds, to save their portion of the Church from what they deem to be a line of action equally inconsistent with a wise conservatism and with true liberty. Their position ought to be considered duly and with charity, and perhaps it will turn out to be as strong ecclesiastically or canonically as it has been again and again declared to be legally by the highest civil tribunal of Appeal in the Empire.

In favour of the abrogation of the existing Constitution, so that the whole position of the Church in South Africa may be dealt with *de novo*, the following considerations may be emphasized :—

(1.) The taint attaching, as above observed, to the Constitution, *ab initio*, and its revolutionary character.

(2.) A grave responsibility affecting the Church Body in general in view of the lamentable state of things in Natal. "*Schismaticus est*," says a familiar maxim, "*qui facit alium schismaticum.*" "Let no one," says St. Cyprian, "take sons of the Church from the Church."

(3.) The anomalous structure of the Provincial Synod.

(4.) To renew all possible bonds with the Mother Church might tend to strengthen her hands in the conflict she is obliged to wage at home to maintain her position against the attacks of the Liberation Society, which, while assuming the rôle of defender of the Liberty of Religion "from State patronage and control," is really assaulting the doctrinal principles of the Church of England.

On the other hand an attitude of isolation may

embarrass the Mother Church in the prosecution of that conflict; and, moreover, may embarrass Churchmen in the other Colonies and the various Dependencies of the Empire in their efforts to keep intact the doctrine and status of the Church.

(5.) The Church in South Africa wants the prestige and the moral support of the whole English Church at her back. She also requires the restoration of power to maintain ordinary discipline.

(6.) The principle of separate action and autonomy has a tendency to foster a spirit of political disintegration which the Church, historically a bond of political and imperial union, has traditionally discountenanced. There is peculiar danger of this in the present circumstances of South Africa.

NOTE.

On the 30th July, 1879, the Ven. H. M. White, Archdeacon of Grahamstown, presented, in the Diocesan Court of Grahamstown, certain articles against the Very Rev. F. H. Williams, D.D., Dean of St. George's Cathedral, Grahamstown, charging the Dean with violation of the law of the Church of the Province of South Africa, of contempt of Section 4 of Cap. I of the Statutes of St. George's Cathedral, and of conduct giving just cause of scandal or offence to the Church. The principal offence alleged lay in the fact that upon Sunday, 27th April, 1879, Dr. Williams had interrupted the Bishop while proceeding to preach, and had himself preached, in spite of express notice by the Bishop of his intention to preach, and notwithstanding the right to do so which the Bishop believed himself to possess. In the Diocesan Court the Ven. H. Badnall, D.D., Archdeacon of the Cape, Commissary of the Bishop of Grahamstown, sat as President, with three assessors; and on the 5th August he delivered judgment, finding the Dean guilty of several of the offences charged, and, by virtue of the provisions of the Constitution of the Church of the Province of South Africa, pronounced sentence of suspension for one calendar month, and until he the Dean, should engage not to repeat the conduct specially complained of. In November a further Court was held, presided over by the Bishop in person, at which sentence of excommunication was pronounced. In the following year the Bishop instituted a suit in the Supreme Court of the Colony of the Cape of Good Hope, against Dr. Williams, praying for a declaration of the Plaintiff's rights, and for an interdict to restrain Dr. Williams from interfering with those rights. The judgment of the Court was against the Bishop, who then appealed to the Privy Council.

JUDGMENT of the Lords of the Judicial Committee of the Privy Council in the Appeal of Merriman (Bishop of Graham's Town) *v.* Williams, from the Supreme Court of the Colony of the Cape of Good Hope, delivered 28th June, 1882.*

PRESENT:

Sir Barnes Peacock, Sir Robert Collier, Sir James Hannen, Sir Richard Couch, and Sir Arthur Hobhouse.

In this case the Plaintiff in the Court below and the Appellant here is the Bishop of Graham's Town, one of the dioceses of the Province of the Church of South Africa. The Defendant in the Court below, and the Respondent here, bears the title of Dean of Graham's Town; he is also the Colonial Chaplain appointed by the Crown for Graham's Town; and he is *de facto* the officiating minister, sometimes called the Rector, of the Church of St. George in Graham's Town. The controversy between the parties has raised a very important

* A Report of this case will be found in L. R. 7 Appeal Cases, 484.

question, but its earlier phases are comparatively unimportant, and may be briefly stated.

In the year 1878 a difference of opinion arose respecting the right to preach in the Church of St. George. The Plaintiff claimed it as his cathedral, in which he had a right to preach whenever he thought fit. The Defendant was willing to allow the Plaintiff to preach whenever he thought fit as a matter of courtesy ; but, as to the matter of right, he held that he as Dean had control over the arrangements. The Plaintiff would not consent to preach except as a matter of right.

On the 17th April, 1879, the Plaintiff attended the church with the object of preaching, having previously admonished the Defendant in a formal way not to hinder him, but the Defendant anticipated the usual time for the delivery of the sermon, and began to preach himself, whereupon the Plaintiff protested and left the church.

For this conduct the Defendant was presented in the Diocesan Court of Graham's Town, and was there found guilty of contumacious disobedience, and of conduct giving just cause of offence or scandal to the Church ; and he was suspended from his ministerial functions for one calendar month and further until he should engage not to repeat the offence of preventing the Bishop from preaching or ministering in the Church of St. George.

As the Defendant refused to obey that sentence, he was excommunicated by a subsequent decree of the same Court.

The present suit was instituted to enforce the sentence of the Diocesan Court. By his declaration, filed on the 21st of April, 1880, after showing that he and the Defendant are officers of the Church of the Province of South Africa, the Plaintiff prays relief in the following terms :—

Wherefore the Plaintiff says that an action has accrued to him, and he prays that this Honourable Court will by its judgment declare,—

That the Defendant is one of the clergy of the said Church within the true intent and meaning of Article XXIV. of the Constitution thereof, and is bound by the laws of the said Church, and by the rules and regulations made by the said Diocesan Synod of Graham's Town, and by the said Provincial Synod, or either of them.

That the Defendant is bound to accept and immediately to submit to any sentence depriving him of any or all of the rights and emoluments appertaining to the office of Dean and Rector of the Cathedral Church of St. George, or to any other office or benefice held by him as dignitary or priest of the said church within the Diocese of Graham's Town, such sentence having been passed upon him after due examination had by the Diocesan Court of Graham's Town, being a tribunal acknowledged by the Provincial Synod for the trial of clergymen, saving all rights of appeal allowed by the said Provincial Synod.

That under and by virtue of the sentences passed upon the Defendant by the Diocesan Court of Graham's Town, on the 5th of August and 13th of November, 1879, respectively as aforesaid, the Defendant is lawfully suspended from his office of priest and other

spiritual promotion and dignity, with total loss of all emoluments derived from any benefice or attached to any office or offices heretofore held by him as dignitary or priest of the said church within the Diocese of Graham's Town.

That the Plaintiff in his episcopal capacity has the right of officiating and performing all ecclesiastical functions within the said cathedral church.

That the Plaintiff, in his said capacity, shall have free and uninterrupted access to the land and premises comprised in the transfer bearing date the 17th of June, 1871 to the trustees under the Diocesan Trust Board of the Diocese of Graham's Town, of the site of the said Cathedral Church of Saint George, and to the said church or cathedral or other buildings erected thereon, for the purpose of enjoying and exercising all rights, privileges and immunities which have heretofore been enjoyed and exercised, or ought to be enjoyed and exercised, by the Bishop of Graham's Town as such Bishop or otherwise, in reference to or within the cathedral thereon and its appurtenances, and that the Defendant and his agents shall be restrained from in any manner interfering with such access, enjoyment or exercise.

And the Plaintiff further prays that this Honourable Court will grant a perpetual interdict restraining the Defendant from hindering the Plaintiff in his awful ministrations within the Diocese of Graham's Town, and further restraining the Defendant from officiating or performing any ecclesiastical functions whatsoever, and from receiving any emoluments in respect of the performance of any ecclesiastical functions whatsoever within the limits of the Diocese of Graham's Town as a dignitary or priest of the said church.

By his pleas the Defendant claims to be Rector of the Church of St. George and to perform ecclesiastical functions in that church as a priest of the Church of England as by

law established. He says that the church of the Province of South Africa is a religious association entirely independent of the Church of England as by law established ; that he himself is not a member of that Church, nor bound by its constitutions or canons ; that the Church of St. George is held in trust for ecclesiastical purposes in connection with the Church of England as by law established ; and that the Plaintiff and the Church of South Africa have no authority or jurisdiction over it.

On the 26th of August, 1880, the Supreme Court pronounced a decree absolving the Defendant from the instance with costs against the Plaintiff.

The ground principally relied on by the Chief Justice, Sir Henry de Villiers, was that the Church of St. George had been devoted to ecclesiastical purposes in connection with the Church of England, and that the Church of South Africa was not, so far as the circumstances of the Colony would permit, a part of the Church of England.

Mr. Justice Dwyer concurred, but he also thought, contrary to the opinion of the Chief Justice, that the Defendant had not so acted as to give the Plaintiff the episcopal jurisdiction claimed by him.

Mr. Justice Smith expressed no opinion on the main question decided by the Chief Justice, doubting whether it could be properly

raised in this suit ; but he concurred in the decree on the ground that the necessary parties for discussing that question were not before the Court.

Their Lordships have now to consider whether this decree is right. Before entering on the discussion they wish to say that in the careful and elaborate judgment of the Chief Justice the case is treated with a gravity befitting its importance, and every topic in turn is handled with a fulness and clearness which are of the greatest assistance to those who have to review it.

They also wish to state their sense of the judicial method and impartiality which marks the proceedings of the Diocesan Court. An objection has been raised to these proceedings on the ground that the Court was improperly constituted, and Mr. Justice Dwyer was of that opinion ; but in the view which their Lordships take of the case it is not necessary to express any opinion on that point.

Turning now to the Plaintiff's prayer, it is clear, and it has not been disputed by his Counsel at the bar, that the greater part of it asks relief which is beyond the competence of the Civil Court to grant in this suit.

The Defendant is not receiving any emolument except as Colonial Chaplain, nor does he hold any benefice in the Church of South Africa, unless it may be the incumbency of the Church of St. George. It is clear, there-

fore, that there is no question before the Civil Court except that which relates to the use of the Church of St. George, and that the relief prayed must be confined to such an execution as under the circumstances may be proper of the trusts upon which the Church of St. George is held.

In order to entitle himself to that amount of relief the Plaintiff must show, first, that he is a proper object of the trusts, and, secondly, that both as between himself and the Defendant and as between himself and other objects of the trusts, he is entitled to have the Defendant restrained from and he himself admitted to the use of the church in question. The first thing then to be ascertained is the precise position of the property in dispute.

It is clear that the site had at some time been vested in the Crown. It does not appear by whom the church was built, but prior to the year 1839 its affairs were regulated by a body called the Church Committee. It seems to have been the practice for the Colonial Chaplain appointed by the Crown to become the officiating minister of the church. It is not possible upon the materials in this Record, and perhaps not important, to ascertain more precisely the state of things prior to 1839.

On the 23rd January, 1839, an Ordinance was passed by the Governor of the Colony of the Cape of Good Hope, with the advice and consent of the Legislative Council and House

of Assembly of that Colony. It recites as follows :—

Whereas it is expedient that the inhabitants of Graham's Town and the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established, should be invested with the right and privilege of choosing and appointing, under certain regulations, a Vestry and Churchwardens for the better and more effectual administration and management of all matters connected with the Church of Graham's Town, commonly called St. George's Church, and that the said Vestry and Churchwardens, after having been duly appointed, should possess certain powers and perform certain duties as the same are usually possessed and exercised by such officers according to the customs and usages of the said United Church of England and Ireland. And whereas on the appointment of the said Vestry and Churchwardens it is expedient that the office of Church Committee as at present constituted should cease and determine.

Provisions are then made for the election of a Vestry and Churchwardens by the male inhabitants of Graham's Town and of the parochial limits thereof, being members of and holding communion with the United Church of England and Ireland as by law established.

The officiating minister is to be chairman of the Vestry when present, and by Section 8 the Vestry are to make rules for their own guidance, "and for more effectually executing the provisions of this Ordinance, and also to take such order for the management of the said Church as to them shall seem expedient.

Provided that the rules contain nothing repugnant to law or to the terms of this Ordinance, or to the customs and usages of the United Church of England and Ireland as by law established."

By Section 10 the Vestry are to have the same powers, rights and duties as were then possessed by the Church Committee.

Section 12 empowers the Vestry to maintain suits in performance of the trusts reposed in them.

Section 14 provides for the keeping of accounts, which are to be audited and laid before the church members at a general annual meeting.

Section 15 provides for the election of Churchwardens so far as applicable to the Colony.

Section 19 enacts that there shall be set apart in the church pews and seats for the civil and military authorities, the minister, the officers of the garrison, and for troops and poor people.

Their Lordships consider the meaning and effect of this Ordinance to be reasonably clear. Whatever may have been the exact rights of the Crown and the inhabitants as between one another, the church was, at the date of the Ordinance, property used for religious purposes. It was desired to place the arrangements on a more public and permanent basis, and to have a governing body more responsible and efficient than the Church Committee.

For that purpose the machinery of election is put in motion. The persons so elected are called a Vestry and Churchwardens in analogy to the English parochial system, but they are elected by the church members, not by the parishioners at large. The Churchwardens receive powers analogous to those of English Churchwardens. But over and above that, the Vestry are clothed with duties and trusts, and made subject to liabilities, for the benefit partly of the church members and partly of the Government, such as appertain only to the trustees and managers of what we should in this country call a charitable endowment. It would be exceedingly difficult for the Crown to contend that the Ordinance did not effect a permanent dedication of the site to charitable uses. But that point need not be discussed because such a dedication was undoubtedly effected by the next transaction.

On the 7th of June, 1849, the Governor of the Colony, in the name and on behalf of Her Majesty, granted the site to Dr. Gray, the Bishop of Cape Town, and his successors in the See "on condition that the land hereby granted shall for ever hereafter be used for ecclesiastical purposes in connection with the Church of England, and to and for no other purpose whatsoever. . . . . Subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands." The site is described as a piece of land on which

the St. George's Church has been erected. It does not appear that any duties or regulations had been established except those which were established by the Ordinance of 1839, nor would there seem to be any mode of establishing any future duties or regulations except by some legislative or judicial authority.

With reference to the expression "ecclesiastical purposes in connection with the Church of England," it is to be observed that the Bishopric of Cape Town was founded in the year 1847, at which time, as is stated in the judgment of *Long* v. *The Bishop of Cape Town*, the legislative authority over the Colony was vested in the Crown. Bishop Gray was appointed by Her Majesty, and ordained and consecrated by the Archbishop of Canterbury, having first taken the oath of allegiance, the oath affirming the Queen's Supremacy, and the oath of obedience to the Archbishop as Metropolitan.

When the grant of 1849 was made the See of Cape Town included Graham's Town. But in the year 1853 Dr. Gray resigned his Bishopric in order that his diocese might be contracted in extent, and that two new dioceses, those of Graham's Town and Natal, might be erected.

On the 8th of December, 1853, the Crown issued Letters Patent assigning to Bishop Gray the new Diocese of Cape Town, and appointing him to be Metropolitan Bishop in the Colony of the Cape of Good Hope and

its dependencies, and the Island of St. Helena.

On the 20th of December, 1853, the Crown issued Letters Patent erecting the Bishopric of Graham's Town, and ordering the consecration of Dr. Armstrong as first Bishop of that diocese. The Bishop and his successors were made a body corporate. Graham's Town was erected into a city and the see of the Bishop. And it was declared "that the Church called St. George, in the said city of Graham's Town, shall henceforth be the Cathedral Church and See of the said John Armstrong and his successors, Bishops of Graham's Town." But the Bishop was left at liberty to constitute any other church at Graham's Town to be his Cathedral and See. The Bishop had power granted to him to found dignities in his cathedral and Archdeaconries in his diocese. By the Bishop's successors were meant persons named and appointed by the Crown, and ordained and consecrated by the Archbishop of Canterbury.

Some time previously to the issuing of these Letters Patent the Crown had granted a Constitution to the Colony, and a representative Colonial Legislature had been established.

On the 20th November, 1857, the Crown issued Letters Patent appointing the Rev. Henry Cotterill to be Bishop of Graham's Town, in the place of Bishop Armstrong, who was then dead, and directing the Archbishop of Canterbury to consecrate him. The

provisions of this instrument, which relate to the Church of St. George, to the power of the Bishop to constitute dignitaries, and to the nature of the Bishop's successors, are precisely to the same effect with the corresponding provisions in Bishop Armstrong's Patent.

On the 17th of July, 1860, an Act of the Colonial Legislature was passed, enabling the Bishop of Cape Town to transfer to the Bishop of Graham's Town for the time being and his successors all immovable property vested in the Bishop of Cape Town, but situate in the Diocese of Graham's Town, "provided that every such property so transferred shall be subject to the same trusts in all respects after such transfer as it was subject to at the time of such transfer."

By a deed dated the 4th of March, 1863, the Bishop of Cape Town conveyed to Bishop Cotterill and his successors the land conveyed by the grant of the 7th of June, 1849, subject to the conditions in that grant mentioned and referred to.

By a deed dated the 17th of June, 1871, Bishop Cotterill conveyed the same property to himself and three other persons, being apparently the Trustees of the Diocesan Trust Board of Graham's Town, to hold upon the trusts upon which the Bishop himself held.

There has been some controversy as to the

regularity of this conveyance of 1871, but their Lordships hold the question to be immaterial. The interest which was passed first to Bishop Gray, then to Bishop Cotterill, and then to the Grantees of 1871, is an interest clothed with no active duties, and subject to the trust duties and regulations created by the Ordinance of 1839 and the conveyance of the 7th of June, 1849. It was not contended at the bar that the position of such a bare interest as this could affect the questions in the case.

Such being the legal position of the property in dispute, it is now necessary to show the position of the disputants, both with reference to one another and with reference to the property.

In the month of February, 1863, Lord Kingsdown delivered the opinion of this Board in a case which threw a new light on the position of the Church of England in South Africa, and showed that the advisers of the Crown had purported to do what was beyond its power. In the controversy between Bishop Gray of Cape Town and Mr. Long, the Colonial Court held that the Letters Patent of 1853, being issued after a Constitutional Government had been established, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the Colony. On appeal to Her Majesty in Council that opinion was upheld. Lord

Kingsdown then proceeds to discuss the question whether the want of coercive jurisdiction in the Bishop had been supplied by the voluntary submission of Mr. Long. He states the position of English Churchmen as follows :—

The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position ; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them.

It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice.

In such cases the tribunals so constituted are not in any sense Courts. They derive no authority from the Crown, they have no power of their own to enforce their sentences,—they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

These are the principles upon which the Courts in this country have always acted in the disputes which have arisen between members of the same religious body, not being members of the Church of England.—Vol. I. Moore's Reports, N.S., p. 461.

In the course of the next year a controversy turning upon the same principles arose between the Bishop of Natal, and Bishop Gray claiming to act as his Metropolitan under the Patents of 1853. The opinion of this Board was delivered by Lord Westbury in December, 1864. As to the power of the Crown the law is thus laid down :—

> We apprehend it to be clear upon principle that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal, there was no power in the Church by virtue of its prerogative (for these Letters Patent were not granted under the provisions of any statute) to establish a metropolitan see or province, or to create an ecclesiastical corporation whose status, rights and authority the Colony could be required to recognize.—Vol. III. Moore's Reports, N.S., p. 148.

And after giving reasons for this opinion his Lordship continues : —

> The same reasoning is of course decisive of the question whether any jurisdiction was conferred by the Letters Patent. . . . . It is quite clear that the Crown had no power to confer any jurisdiction or coercive authority upon the Metropolitan over the Suffragan Bishops, or over any other person.

The question then arose whether the Bishop of Natal had by contract given the jurisdiction claimed by Bishop Gray. On this point Lord Westbury says :—

> Even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or

exercise, any such jurisdiction.—Vol. III. Moore's Reports, N.S., p. 155.

One effect of these expositions of the law was that the Crown ceased to grant Letters Patent for Bishops in colonies possessing independent Legislatures. It has been supposed in this case that the Crown might still take such action as to give to Graham's Town a Bishop who should be a successor to Bishops Armstrong and Cotterill within the terms of the Patent creating the Bishopric. But though the Crown has not in any formal or public way decided not to resume the practice prevailing prior to 1863, their Lordships are clear that this case must be decided on the footing that the practice no longer exists.

Another effect of the decisions was that English Churchmen in the Colonies took steps to organize themselves, like other independent religious societies, on the footing of contract. This was done in South Africa by the action of Synods, the effects of which will be presently discussed.

In the year 1865 the Defendant, who was then the Vicar of Ashton-under-Lyne, agreed with Bishop Cotterill, who was in England, that he should accept the office of Colonial Chaplain at Graham's Town, and should also be appointed Dean of Graham's Town. He was accordingly appointed to be Colonial Chaplain by letter from the Secretary of State,

and he went to the Colony in November, 1865. He had before leaving England signed declarations of obedience to the Bishop of Graham's Town and his successors, and of submission to the rules and regulations of the Synod of the Diocese of Graham's Town, in all things not contrary to the laws of the United Church of England and Ireland. And he also subscribed to the three articles required to be subscribed by the 36th of the Canons of 1603.

On his arrival in the Colony he found that the Vestry were in possession of the Church of St. George, as according to the Ordinance of 1839 they ought to have been. They appear to have accepted the Colonial Chaplain to be their Officiating Minister as a matter of course, according to the usual practice, and they put the Defendant into possession of the church by handing him the keys, which are the symbols of possession. This, he says, was done under the Ordinance of 1839, by the provisions of which St. George's Church has always been governed. With a natural fondness for terms which bring the familiar system of the mother country before the mind he calls this proceeding an induction of himself as Rector.

Two or three months afterwards Bishop Cotterill returned to the Colony, and he then appointed the Defendant to be Dean of Graham's Town, and installed him in the

church as such. So far as the dignity goes, the Bishop may have had power under his Patent to create it, but he could not confer any authority with it except such as might flow from contracts between the Defendant and others. In this case there were no special statutes for the cathedral, nor have any been made till after the present dispute began.

It is important not to be misled by the false analogies of English ecclesiastical titles. The Defendant is a titular Dean, and may be called a Rector. But in point of law, and for the present purpose, he must be taken as the officiating minister of a church governed by the Ordinance of 1839 and the grant of 1849, and appointed thereto either by the Vestry, or by the Crown, or by the joint action of the two. Neither the Vestry nor the Crown have been made parties to this suit. If it were necessary to determine the precise origin of the Defendant's title, their Lordships would have to deal with the difficulty as to the frame of suit which has been indicated by the Chief Justice, and on which Mr. Justice Smith bases his judgment.

In the years 1867 and 1869 Synods were held for the Diocese of Graham's Town. In the year 1870 was held the first Provincial Synod of the Church of South Africa. By these Synods much was done to establish that Church on a voluntary basis. It is sufficient

for the present to say of them that the Defendant took an active and leading part in the proceedings.

In the year 1871 Bishop Cotterill resigned his office, and, as no appointment of a successor by Letters Patent could be looked for, Bishop Gray, as Metropolitan, issued a mandate addressed to the Defendant commanding an election of a new Bishop. The result was the election of the Plaintiff, and in that election the Defendant took the leading part.

Some time afterwards the Defendant became dissatisfied with the proceedings of the Synod, but he did not withdraw from his position in the Church of South Africa. When the present dispute began the Defendant did not contend that the Plaintiff had not the ecclesiastical character which he claimed to have. On the contrary, the Defendant insisted on his own rights as Dean, which, as he asserted quite erroneously, would, according to English ecclesiastical law, give him the right of excluding the Bishop from ministrations in the cathedral. It is only during this litigation that the Defendant has contended either that he himself is not a member of the Church of South Africa, or that the Plaintiff is not the successor of Bishop Cotterill, or that the Plaintiff and his Church are disconnected with the Church of England.

Their Lordships consider that the Defendant's present contention is wholly inconsis-

tent with his past conduct. The Chief Justice says on this point:—

> It is idle for the Defendant to deny that he joined the Church of South Africa and became personally subject to its constitutions and canons, in the face of the part which he took in the discussions of the Provincial Synod of 1870, and in the absence of any protest against the separatist canons adopted by that Synod. It is still more idle for him to deny that he has subjected himself personally to the episcopal jurisdiction of the Plaintiff according to the laws of the Church of South Africa, in the face of the documentary proof which exists of his active participation in the election of the Plaintiff.

Of the same opinion was Mr. Justice Smith, and with it their Lordships entirely agree.

So far then as this dispute turns on the question whether the Defendant has come under personal contracts or equities the Plaintiff has proved his case. But the Defendant cannot contract away the rights of other people. If he is occupying an office in which he owes duties to the Government, to the Vestry, or to the Church members, he cannot by his contract give to any extraneous person or body rights which may interfere with those duties. If again the Plaintiff belongs to a religious body which cannot claim to be in connection with the Church of England as by law established, no contract with the Defendant or with anyone else can give him a right to use property which is settled to uses in connection with that Church. Their

Lordships will address themselves to this latter question, which they think must govern the case. For that purpose they have to examine the Acts of the Synods which are set forth in this Record.

In conducting this examination their Lordships do not enter into the discussions whether or no the Church of South Africa is a branch of or identical with the Church of England. What the Charters of the endowment now in question require is connection with the Church of England as by law established; and on this part of the case it is sufficient for the Plaintiff if he can show such a connection on the part of the Church of South Africa.

One thing which their Lordships conceive to be necessary for establishing such a connection between the Church of England and another Church is a substantial identity in their standards of faith and doctrine. Where the other Church is that of a colony possessing an independent Legislature, there must be differences, as for instance in the appointment of Bishops and in the erection of courts, such as necessarily result from the difference of political circumstances in which the Church of England and the other Church find themselves placed. There may probably be other differences, which might be yet too slight to work a disconnection, and which need not now be considered.

Among the acts of the Synod of 1870 there

are several provisions which in the Supreme Court and here have been relied on to show a disconnection between the Church of South Africa and the Church of England, and which their Lordships will not now discuss in detail. Such are the provisions of the 27th Canon, the declarations which refer to a possible alteration of the creeds, and to a possible alteration of formularies by a general assembly, the provision in the 3rd Canon for the election of Bishops without the consent of the Crown, and the constitution of separate Ecclesiastical Courts. Their Lordships are not prepared to say that the effect of these provisions is to disconnect the Church of South Africa from the Church of England. The most important in this respect are the two last mentioned provisions. But they are the necessary results of the legal and political situation as laid down by Her Majesty in Council, not the expression of any separatist intention. If they worked a disconnection, there would be an absolute impossibility of connection between two Churches so situated. And it appears to their Lordships that, though the existence of separate systems of appointing Bishops and of ecclesiastical tribunals is likely enough in the course of time to lead to divergencies, the mere fact of their establishment does not produce any such effect.

It is the first article of the Constitution, and especially the 3rd Proviso attached to it,

which, in their Lordships' opinion, creates the great difficulty in the way of holding that the Church of South Africa is in connection with the Church of England. That article is as follows :—

ARTICLES OF THE CONSTITUTION.

1. The Church of the Province of South Africa receives the doctrine, sacraments and discipline of Christ as the same are contained and commanded in Holy Scripture according as the Church of England has received and set forth the same in its standards of faith and doctrine, and it receives the Book of Common Prayer, and of ordering of Bishops, Priests and Deacons, to be used according to the form therein prescribed in public prayer and administration of the sacrament and other holy offices, and it accepts the English version of the Holy Scriptures as appointed to be read in churches, and further it disclaims for itself the right of altering any of the aforesaid standards of faith and doctrine.

Provided that nothing herein contained shall prevent the Church of this Province from accepting, if it shall so determine, any alterations in the formularies of the Church (other than the Creeds) which may be adopted by the Church of England, or allowed by any General Synod, Council, Congress, or other assembly of the Churches of the Anglican Communion, or from making at any time such adaptations and abridgments of and additions to the services of the Church as may be required by the circumstances of this Province.

Provided that all changes in and additions to the services of the Church made by the Church of this Province shall be liable to revision by any Synod of the Anglican Communion to which this Province shall be invited to send representatives.

Provided also that in the interpretation of the aforesaid standards and formularies the Church of this Province be

not held to be bound by decisions in questions of faith and doctrine or in questions of discipline relating to faith and doctrine other than those of its own ecclesiastical tribunals, or of such other tribunal as may be accepted by the Provincial Synod as a tribunal of appeal.

There are in this Article and in other parts of the Synodical proceedings general expressions affirming in the strongest way the connection of the Church of South Africa with the Church of England, and its adherence to the faith and doctrine of the Church of England. But all these general expressions are unavailing for the present purpose, if on coming to particulars we find that the Constitution substantially excludes portions of the faith and doctrine of the Church of England. The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church.

It has been argued that the Church of South Africa has here done all that existing political circumstances permitted it to do for continued connection with the Church of England, and again that the proviso is a mere

statement of the facts of the case, and means no more than this: that as the Church of South Africa must have tribunals of its own, it hereby places on record that their decisions should be binding.

The necessity of separate tribunals and its probable consequences has been above dealt with. But their Lordships consider that the proviso under consideration is very much more than a recognition of the facts of the case; and that the Church of South Africa, so far from having done all in its power to maintain the connection, has taken occasion to declare emphatically that at this point the connection is not maintained.

It was competent to the Church of South Africa to establish for itself any system of law which it thought fit. The facts of the case did not compel it to say that its tribunals shall not take English decisions as authoritative. It might have declared that the decisions of the tribunals established by law for the Church of England, whether past or future, should be binding on the tribunals of the Church of South Africa. That would probably keep the two churches in connection for the longest period of time, though it would not be necessary to go so far in order to maintain the connection at the outset.

But the obvious course for a Church which desired to be in connection with the Church of England to all intents and purposes would

be at least to say at starting that its faith, doctrine and discipline should be those which then prevailed in the Church of England. Such a Church would, until some fresh departure occurred, be in connection with the Church of England.

Their Lordships were strongly invited by the Respondent's Counsel to connect the proviso under consideration with the course of some well-known controversies. There is no judicial ground for saying that it was aimed at any special practice or doctrine. But its practical effect may well be illustrated by reference to some important decisions of Her Majesty in Council. For instance, the decisions in the cases of *Gorham* v. *The Bishop of Exeter* and *Williams* v. *The Bishop of Salisbury*, both delivered prior to the Synod of 1870, affirm and secure the right of a clergyman of the Church of England to preach freely the doctrines which were then in question; but in the Church of South Africa a clergyman preaching the same doctrines may find himself presented for and found guilty of heresy. Such a reservation on the part of the Church of South Africa must tend to silence and to exclude those whom the decisions of Her Majesty in Council would protect in the Church of England.

The decisions referred to form part of the Constitution of the Church of England as by law established, and the Church and the

tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in the standards of faith and doctrine which appears to their Lordships necessary to establish the connection required by the trusts on which the Church of St. George is settled. There are different standards on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation.

It is argued that the divergence made by the Church of South Africa is only potential and not actual, and that we have no right to speculate on its effect until the tribunals of South Africa have shown whether they will agree or disagree with those of England. Their Lordships think that the divergence is present and actual. It is the agreement of the two Churches which is potential. The ecclesiastical tribunals of South Africa may possibly decide in all important points as Her Majesty in Council has done. But the question is whether they have the same standard; and, as has been shown, they have a different standard.

Of course it was perfectly competent to the Church of South Africa to take up its own

independent position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefit of endowments settled to uses in connection with the Church of England as by law established.

Such being their Lordships' view of the Synodical proceedings in 1870, it is not necessary to consider further whether the Defendant's position is such as to enable him by his conduct to give to the Plaintiff the rights he claims, or whether the suit is so constituted as to enable the Plaintiff to obtain any decree for the enjoyment of property situated as this is. It will have been seen by the foregoing observations that there is difficulty on both these points.

Their Lordships wish to add their opinion that courts of law cannot settle in any satisfactory way questions affecting permanent endowments after a total change of circumstances has occurred, and their concurrence with the Chief Justice in thinking that the Legislature alone can properly deal with such cases.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal. Costs must follow the result.